Unfair, Deceptive & Abusive Acts & Practices: False or Misleading Advertising

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Challenge to Mortgage Originators: Marketing Legally In the Digital Age
“Marketing through social networks is exploding while penalties for breaking the rules are increasing.”
By the end of 2013 50% of all companies will be asked to produce content from social media websites for e-discovery.

Requests to financial services firms for social media data during regulatory exams in 2010 rose 65% over previous years.

63% of IT & IT Security professionals agree that employee use of social media puts organization’s security at risk.

Threat includes damage to brand reputation and loss of customer trust.

40% of organizations lack corporate policies for social media use in the workplace.

- Source: Smarsh.com website

(Valid statistics? Probably not, but problem IS real.)

“As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500)…of the Business and Professions Code.” (Emphasis added.)
Unfair & Deceptive Acts and Practices: False or Misleading Advertising

Remedies for Violation of B&P Code §§17200 and 17500:

Private Litigants:
- Injunction
- Restitution

Law Enforcement Officials:
- Injunction
- Restitution
- Civil Money Penalties
- 17500 Violations can be pursued criminally as misdemeanor, subject to 6 month jail term + $2,500 fine (Discussed below)
Unfair & Deceptive Acts and Practices: False or Misleading Advertising

Dodd-Frank: “UDAAP” (UDAP on Steroids)

(a) It shall be unlawful for—

(1) any covered person or service provider—
(A) to offer or provide to a consumer any financial product or service not in conformity with Federal consumer financial law, or otherwise commit any act or omission in violation of a Federal consumer financial law; or
(B) to engage in any unfair, deceptive, or abusive act or practice; (emphasis added)

(2) any covered person or service provider to fail or refuse, as required by Federal consumer financial law, or any rule or order issued by the Bureau thereunder—
(A) to permit access to or copying of records;
(B) to establish or maintain records; or
(C) to make reports or provide information to the Bureau; or

(3) any person to knowingly or recklessly provide substantial assistance to a covered person or service provider in violation of the provisions of section 5531 of this title, or any rule or order issued thereunder, and notwithstanding any provision of this title, the provider of such substantial assistance shall be deemed to be in violation of that section to the same extent as the person to whom such assistance is provided.

(b) No person shall be held to have violated subsection (a)(1) solely by virtue of providing or selling time or space to a covered person or service provider placing an advertisement.
Unfair & Deceptive Acts and Practices: False or Misleading Advertising

CFPB “UDAAP” Examination Objectives:

• To assess the quality of the regulated entity’s compliance risk management systems, including internal controls and policies and procedures, for avoiding **unfair**, **deceptive**, or **abusive** acts or practices.

• To identify acts or practices that materially increase the risk of consumers being treated in an unfair, deceptive, or abusive manner.

• To gather facts that help determine whether a regulated entity engages in acts or practices when offering or providing consumer financial products or services that are likely to be unfair, deceptive, or abusive.

• To determine, in consultation with Headquarters, whether an unfair, deceptive, or abusive act or practice has occurred and whether further supervisory or enforcement actions are appropriate.
California Requirements
Unfair & Deceptive Acts and Practices: False or Misleading Advertising

• Currently no Federal Laws restricting Internet advertising
• Dept of Real Estate ("DRE") has a regulation pertaining to internet advertising (10 Cal. Code of Regulations §2770). Advertisers will not be deemed to be engaged in an activity for which a Real Estate license is required if:
  – The advertiser does not direct his/her services to any particular person or customer located in California;
  – Advertisement is limited to general information about the services;
  – Advertisement does not involve a service provided in connection with activity for which a real estate license is required;
  – Advertisement is not published or circulated on behalf of another;
  – Advertiser is engaged exclusively in advertising and performs no other acts requiring a real estate license
B&P Code §17500: “It is unlawful for any person, firm, corporation, or association, or any employee thereof with intent directly or indirectly to…perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state…or from this state before the public in any state, in…any…manner or means whatever, including over the Internet, any statement…concerning those services…or any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading…”
Penalty for Violation of B&P Code § 17500:

“Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or both that imprisonment and fine.”

RE Licensees may also face discipline from DRE under B&P Code §10177(c)

[Note: Provisions of §17500 limited by Federal preemption for national banks and their employees]
See also:

**B&P Code §17537**: Unlawful advertising (conditional offer of prizes or gifts);

**B&P Code §17537.1**: Unlawful advertising (incentives to visit locations, attend sales presentations, or contact sales agents);

**B&P Code §17537.2**: Deceptive and Unfair Trade Practices (more prohibited misleading incentives)
License Disclosure [B&P Code §17539.4]:

“No person shall place an advertisement disseminated primarily in this state for a loan which utilizes real property as collateral unless there is disclosed within the printed text of that advertisement, or the oral text in the case of a radio or television advertisement, the license under which the loan would be made or arranged, [and] the state regulatory entity supervising that type of loan transaction… .”
Unfair & Deceptive Acts and Practices: False or Misleading Advertising

Penalty for Violation of above B&P Code Sections:

“Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.”
NMLS Disclosure [B&P Code §10235.5(a)]:

“No real estate licensee or mortgage loan originator shall place an advertisement disseminated primarily in this state for a loan unless there is disclosed within the printed text of that advertisement, or the oral text in the case of a radio or television advertisement, the [DRE] license number and the unique identifier assigned to that licensee by the Nationwide Mortgage Licensing System and Registry (NMLS) under which the loan would be made or arranged.”
Mortgage Loan Originator: “…an individual who, for compensation or gain, or in the expectation of compensation or gain, takes a residential mortgage loan application or offers or negotiates terms of a residential mortgage loan.” [B&P Code §50003.5] (RMLA & CFL)

Mortgage Loan Originator: “…an individual who takes a residential mortgage loan application or offers or negotiates terms of a residential mortgage loan for compensation or gain.” [B&P Code §10166.01(b)(1)] (DRE)

Residential Mortgage Loan: “…any loan primarily for personal, family, or household use that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling… . ‘Dwelling’ means a residential structure that contains one to four units, whether or not that structure is attached to real property. The term includes an individual condominium unit, cooperative unit, mobilehome, or trailer, if it is used as a residence.” [B&P Code §10166.01(d)]
Other Disclosures by DRE Licensees:

---Every real estate licensee must also display his or her eight digit DRE license number on all advertisements soliciting borrowers or potential investors. [B&P Code §10236.4(a)]

---In the borrower and lender/purchaser disclosure statements (MLDS and LPDS) a real estate licensee must also disclose the DRE license number and mortgage loan originator unique identifier and the DRE information telephone number that a consumer may call to inquire about the licensed status of the broker. [B&P Code §10236.4(b)]
Misleading or Deceptive Advertising (DRE Licensees):

“No real estate licensee shall knowingly advertise, print, display, publish, distribute, telecast or broadcast, or cause or permit to be advertised, printed, [etc] in any manner any statement or representation with regard to the rates, terms, or conditions for making, purchasing or negotiating loans or real property sales contracts which is false, misleading or deceptive.”

“Indicating or otherwise implying any specific yield or return on any note other than the interest rate specified in said note shall be prima facie evidence that such advertisement is misleading or deceptive unless the advertisement sets forth the actual interest rate specified in the note and the discount from the outstanding principal balance at which it is being offered for sale.”

[B&P Code §10235]
In addition, DRE Regulation 2848 lists 19 examples of what the Department considers to be false or misleading loan advertisements:

1) The use of “guaranteed,” “insured,” “bonded,” “sure,” “safe,” “sound” or other words or phrases of similar import to describe or characterize the security of lenders' or purchasers' funds, or the return to lenders or purchasers from the use of their funds, without an accompanying statement of fact supporting the use of the words or phrases implying high security. A representation to the effect that no losses or minimal losses have been sustained by lenders or purchasers doing business with the licensee shall include the period of time to which the representation applies.

2) The use of terms in the comparative or superlative degree to describe any aspect of the business of the licensee, or any terms applicable to loans negotiated by the licensee, without such additional information as necessary to make the representation unambiguous in the context in which it is used.
(3) A statement that the licensee represents any lender enumerated in Section 10133.1(a) of the Code unless the licensee has a contractual arrangement to act as agent or representative for such lender.

(4) An implication contrary to the fact that the licensee will act in the capacity of a lender rather than as an agent or that a borrower will be able to obtain a loan without deductions from the principal amount for the payment of commissions, costs and expenses customarily attendant upon mortgage loan broker transactions.

(5) A representation of a specific installment in repayment of a loan without an equally prominent disclosure of the following information about the loan:

(A) Principal amount
(B) Simple annual interest rate
(C) Annual percentage rate
(D) Number, amount and period of payments scheduled to the date of maturity
(E) Balance due at maturity (balloon payment) if not fully amortized.
(6) A representation of a specific installment payment, interest rate, annual percentage rate or other provision concerning a loan unless it is clearly indicated whether the advertised terms are available for first loans, junior loans or for both first and junior loans.

(7) A representation or implication that loans are available on terms more favorable to the borrower than terms then generally available in the community through mortgage loan brokers or other sources for loan funds unless the advertised terms are in fact then available to a borrower without the application of undisclosed, special conditions or restrictions to qualify the borrower or the security for the loan.

(8) A representation or implication that loans are available on terms more favorable to the borrower than terms then generally available in the community through mortgage loan brokers or other sources for loan funds unless the broker has previously presented evidence satisfactory to the commissioner that the advertising is not illusory or deceptive in light of all relevant factors of the broker's business practices including the amount of loan funds prospectively available to meet borrower demands in response to the advertising.
(9) A representation that loans are available at or to a maximum percentage of market value unless there is a disclosure as to how market value will be determined for purposes of a loan transaction.

(10) A representation or implication that the credit rating or other personal financial data of the prospective borrower will not be a factor in determining eligibility for a loan unless the broker in fact neither conducts nor causes to be conducted any investigation or inquiry into any aspect of any prospective borrower's credit rating or into his personal financial circumstances for the purpose of determining his qualifications for a loan.

(11) A representation or implication that a loan can or will be approved by telephone.

(12) A representation implying that the Department or any other governmental agency has endorsed or approved any aspect of the licensee's business activities. A statement that the offering referred to in the advertisement is being made under authority of a permit issued by the Department or by the Department of Corporations without more, will not be considered to be a representation implying endorsement or approval by a governmental entity.
(13) A representation or implication contrary to fact as to the number and location of offices maintained by the licensee for the conduct of his/her mortgage loan brokerage business.

(14) Use of “investment plan,” “growth plan,” or similar term to describe a program of a licensee carrying on activities described in Section 10131.1.

(15) The use of “savings,” “savings plan” or terms of similar import indicating that the licensee is engaged in business activities requiring a particular license, permit or authority unless the licensee then has such a license, permit or authority.

(16) A representation of a simple annual interest rate without an equally prominent disclosure of the annual percentage rate.
(17) A representation of an installment in repayment of an adjustable rate, interest only or payment-option loan without an equally prominent disclosure of the following information about the loan:

(A) Principal amount; (B) Term of loan; (C) Initial interest rate; (D) Number of months the initial interest rate will be in effect; (E) Fully-indexed interest rate; (F) Maximum interest rate; (G) If different, an explanation of the difference between the payment rate, initial interest rate and fully-indexed rate; (H) Annual percentage rate; (I) How often the interest rate and payments can change; (J) Maximum periodic change in the interest rate and payments (periodic caps); (K) Number of months and percentage of original loan amount after which minimum payments will not be accepted and the loan re-amortizes; (L) The monthly payment based on the maximum interest rate, and the loan balance after all negative amortization is included, assuming minimum payments are made; (M) If the loan contains a prepayment penalty, a statement to that effect; (N) If the loan contains a balloon payment, a statement to that effect.
(18) A statement that the licensee can arrange “low doc/no doc”, “no income/no asset”, “stated income”, “stated asset”, “no ratio” or similar loan products without a statement that these products may have a higher interest rate, more points or more fees than other products requiring documentation.

(19) The failure to include a statement, in an advertisement for investments in trust deeds secured by one or more interests in real property, that “investments in trust deeds secured by one or more interests in real property are subject to risk of loss”. Any advertisements, for investments in trust deeds secured by one or more interests in real property shall be retained for a period of three years from the date of its last publication or use. After notice, advertisements for investments in trust deeds secured by one or more interests in real property shall be made available for examination, inspection, and copying by the commissioner or his or her designated representative during regular business hours.
Advance DRE Approval:
“A real estate broker, prior to use of any proposed advertisement...may submit a true copy thereof to the [DRE] for approval [with $40 fee]...If disapproval of the proposed advertisement is not communicated...to the broker within 15 calendar days after receipt...the proposed advertisement shall be deemed approved, but the department shall not be precluded from disapproving a later publication or other use of the same or similar advertising.” [B&P Code §10232.1(a)]
(Note: Approval good for 5 years, but DRE checks only for compliance with state law.)
Unfair & Deceptive Acts and Practices: False or Misleading Advertising

B&P Code §10232.1(a):

“…Except as provided in subdivision (b), ‘advertisement’ includes dissemination in any newspaper, circular, form letter, brochure or similar publication, display, sign, radio broadcast or telecast, which concerns (1) the use, terms, rates, conditions, or the amount of any loan or sale referred to in subdivisions (d) and (e) of Section 10131 or Section 10131.1 or (2) the security, solvency, or stability of any person carrying on the activities described in those sections.”

(A curious definition…!)
B&P Code §10232.1(b):

“‘Advertisement’ does not include a letter or brochure that meets both of the following criteria:

(1) It is restricted in distribution to other real estate brokers and to persons for whom the broker has previously acted as an agent in arranging a loan secured by real property or in the purchase, sale, or exchange of a deed of trust or real property sales contract.

(2) It is restricted in content to the identification and description of the terms of loans, mortgages, deeds of trust, real property sales contracts, or any combination thereof offered for funding or purchase through the broker as agent.”
Federal Requirements
Unfair Acts or Practices

The standard for unfairness in the Dodd-Frank Act is that an act or practice is unfair when:

- (1) It causes or is likely to cause substantial injury to consumers,
- (2) The injury is not reasonably avoidable by consumers, and
- (3) The injury is not outweighed by countervailing benefits to consumers or to competition.
UDAAP Narrative: CFPB Examination Manual

Deceptive Acts or Practices

A representation, omission, actor practice is deceptive when

- (1) The representation, omission, act, or practice misleads or is likely to mislead the consumer,
- (2) The consumer’s interpretation of the representation, omission, act, or practice is reasonable under the circumstances, and
- (3) The misleading representation, omission, act, or practice is material.
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UDAAP Narrative: CFPB Examination Manual

Abusive Acts or Practices
The Dodd-Frank Act makes it unlawful for any covered person or service provider to engage in an “abusive act or practice.” An abusive act or practice:

– Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service or

– Takes unreasonable advantage of –
  • A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
  • The inability of the consumer to protect its interests in selecting or using a consumer financial product or service; or
  • The reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

– Although abusive acts also may be unfair or deceptive, examiners should be aware that the legal standards for abusive, unfair, and deceptive each are separate.
Unfair & Deceptive Acts and Practices: False or Misleading Advertising

**Fair Housing Laws:** When advertising products and services, MLOs must follow Fair Housing Laws that prohibit lenders from discriminating against borrowers based on race, etc. Lenders required to:

- Use “Equal Housing Lender” logo in all print ads
- Have “Equal Housing Lender” spoken in all broadcast spots

**Real Estate Settlement Procedures Act (RESPA):**

- Agents and lenders must split the cost of shared advertisements to avoid liability under Section 8 for illegal kickbacks
- Ads must not lead public to believe that separate parties are affiliated
- Ad must “clearly” convey that consumers not bound to work with either provider and are free to compare options in the marketplace
In addition to California requirements, advertising of real estate financing is also regulated by the Truth-in-Lending Act ("TILA") and its implementing regulation, "Regulation Z." (15 U.S.C. §1601 et seq. and 12 C.F.R. Part 226)

Now enforced by Consumer Financial Protection Bureau

If a loan is subject to TILA and Reg.Z, the advertisement for that loan is subject to TILA and Reg. Z
Advertising finance charges and rates: If an advertisement includes a rate or finance charge, it must:

- State the rate as an “annual percentage rate” or APR, using the words or the abbreviation;
- Declare that the rate may be increased after the transaction is closed, if that is true;
- Not state any other rate other than a simple annual rate or a periodic rate that is applied to an unpaid balance; and
- When stating any simple or periodic rate, mention it in conjunction with and not in replacement of, the APR (and not more conspicuously than the APR).
Unfair & Deceptive Acts and Practices: False or Misleading Advertising

• No specific rules concerning the format of the advertisement (e.g. font size), but Reg. Z requires that advertisements be “clear and conspicuous.” (Reg. Z §226.24 & commentary)

• Advertisement need not include an explanation of what is meant by “Annual Percentage Rate” or “APR”
Payments at lower rate than interest accrual:

Lower rate may be advertised as long as referred to as the “effective rate,” “payment rate,” or “qualifying rate” AND the advertisement contains:

1. The term of the reduced payment schedule;
2. The interest rate upon which the reduce payments are calculated;
3. The rate at which the interest is actually accruing;
4. The annual percentage rate.

Also, the APR stated must take into account the interest that will accrue but not be paid during the period.
Advertising Rate Buy-Downs: Permitted, provided that:

– Advertisement also discloses the term to which the reduced rate applies; and
– Shows the simple interest rate applicable to the balance of the term

[Reg Z §226.24 and Commentary]
Certain Financing Terms Cannot be Mentioned Alone

If ad contains any of the following “triggering” terms:

– Dollar amount or % of down payment
– Number of payments or number of years to repay
– Dollar amount of any payment
– An interest rate or finance charge

It must also disclose the following:

– The terms of repayment over life of the loan, including ARMs, Balloon payments or temporary buy-downs
– Dollar amount or % of down payment
– The Annual Percentage Rate (“APR”)
Updated rate and payment rules (effective 10-1-09):

- If interest rate is fixed over the life of the loan, the rate and APR must be printed in the same size letters;
- If advertising a payment, must also include the fact that the payment does not include taxes, mortgage or homeowners insurance;
- If rate or payment is not fixed (Buydown, ARM, or Balloon), must also disclose:
  - Each rate or payment and Time period changes for entire term of the loan;
  - If loan is an ARM, future rate must be disclosed by adding index plus margin
Prohibited Practices under TILA

1. Misleading advertising of “fixed” rates and payments
2. Misleading comparisons in advertisements
3. Misrepresentations about government endorsement
4. Misleading use of current lender’s name
5. Misleading claims of debt elimination
6. Misleading use of the term “counselor”
7. Misleading foreign language advertisements (e.g., trigger terms only in a foreign language)
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Prohibited Practices under CFPB Reg. “N”

• Title X of Dodd-Frank Act transferred to CFPB rule making authority for numerous consumer financial protection laws from 7 Federal agencies to CFPB as of July 21, 2011

• CFPB (“the Bureau”) is in the process of republishing the regulations with “conforming changes” to reflect transfer of authority to CFPB

• “Regulation N” effective Dec. 16, 2011 is an “interim final rule” that does this with FTC’s “Mortgage Acts and Practices---Advertising Rule”

(Purportedly makes “no change to existing rule”---but that rule was only issued by FTC as a “new” rule on July 22, 2011 !)
Prohibited Representations Under Rule N:

“It is a violation of this part for any person to make any material misrepresentation, expressly or by implication, in any commercial communication, regarding any term of any mortgage credit product, including but not limited to misrepresentations about:

a. The interest charged for the mortgage credit product…

b. The annual percentage rate, simple annual rate, periodic rate, or any other rate

c. The existence, nature, or amount of fees or costs to the consumer associated with the mortgage credit product…;
d. The existence, cost, payment terms, or other terms associated with any additional product or feature that is or may be sold in conjunction with the mortgage credit product…

e. The terms, amounts, payments, or other requirements relating to taxes or insurance associated with the product…(including info about impounds)

f. Any prepayment penalty associated with the product

g. The variability of interest payments or any other terms

h. Any comparison between any rate or payment available for less than the full length of the mortgage credit product and any actual rate or payment

i. The “type” of mortgage credit product, including whether loan is or is not fully amortizing
J. The amount of the obligation or the existence, nature, or amount of cash or credit available to the consumer...

K. The existence, number, amount, or timing of any minimum or required payments (or that no payments are required in a reverse mortgage)...

L. The potential for default under the mortgage credit product, including misrepresentations of the circumstances under which consumer could default for nonpayment of taxes, insurance, or other maintenance obligations

M. The effectiveness of the product in helping the consumer to reduce, resolve difficulties in paying debts or in eliminating or reducing debt, including reps that the product can reduce, eliminate or restructure debt

N. Association of the product or provider with any other person or program
Unfair & Deceptive Acts and Practices: False or Misleading Advertising

O. The source of any commercial communication, including but not limited to reps that communication is from consumer’s current mortgage lender

P. The right of the consumer to reside in the dwelling or the duration of such right (reverse mortgages)

Q. The consumer’s ability or likelihood to obtain any mortgage credit product or term, including pre-approval;

R. The consumer’s ability or likelihood to obtain refinancing or modification

S. The availability, nature, or substance of counseling services regarding any mortgage credit product or term
Section 1014.5: Violation to obtain or attempt to obtain a waiver from any consumer of protections provided by, or any right of, the consumer provided under this part.
Unfair & Deceptive Acts and Practices: False or Misleading Advertising

CFPB Enforcement Options:

- Investigations
- Administrative Adjudications
- Civil Actions
- Criminal Referrals
Unfair & Deceptive Acts and Practices: False or Misleading Advertising

CFPB Enforcement Options (Available Remedies):

**Cease and Desist Orders**
- Including temporary cease and desist orders

**Civil Money Penalties**
- Up to $5,000 per violation, per day
- Up to $25,000 for reckless violations; $1 million for knowing violations

**Other Available Remedies**
- Rescission or reformation of contracts
- Refund of money or return of real property
- Restitution
- Disgorgement of compensation for unjust enrichment
- Damages or other monetary relief
  -- Limits on activities and functions

**Recovery of Costs in Civil Actions**
Unfair & Deceptive Acts and Practices: False or Misleading Advertising

CFPB Enforcement Action Against Capital One

**Subject of Enforcement Action:**
Capital One’s marketing practices for credit card add-on products such as payment protection and credit monitoring. CFPB alleged that Capital One’s third-party agents used deceptive marketing practices to pressure or mislead consumers to pay for these add-on products and that Capital One failed to provide proper oversight.

**Penalties:**
- Cease & Desist from marketing and solicitation of add-on products until submits compliance plan to CFPB
- Refund $140 Million to customers (CFPB)
- Refund an additional $10 Million (OCC)
- Pay $25 Million Civil Penalty to CFPB
- Pay $35 Million Civil Penalty to Comptroller of the Currency (OCC)
- Hire independent auditor to monitor compliance

In total, Enforcement Action cost Capital One $210 Million---10 times more than the largest settlement ever obtained by the FTC
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Conclusion:

“Am I a real boy?
No, Pinocchio. To make Geppetto's wish come true will be entirely up to you.
Up to me?
Prove yourself brave, truthful, and unselfish, and someday you will be a real boy.
A real boy!
That won't be easy. You must learn to choose between right and wrong.
Right and wrong? But how will I know?”
The CFPB will tell you.

---Excerpt from “Pinocchio” by Walt Disney (slightly modified)
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PFEIFER & DE LA MORA, LLP

Pfeifer & De La Mora, LLP is an “AV” rated law firm dedicated to providing premium representation at reasonable rates to members of the financial services industry, including lenders, servicers, investors, brokers, and related service providers.

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